Filed 4/1/20 P. v. Arriola CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALBERT ARRIOLA, Defendant and Appellant.	B297120 (Los Angeles County Super. Ct. No. PA030665)

APPEAL from an order of the Superior Court of Los Angeles County, Hayden A. Zacky, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Idan Ivri, Deputy Attorney General, for Plaintiff and Respondent.

Based on his participation in a series of gang-related shootings on July 12, 1998, Albert Arriola was convicted of, among other crimes, four counts of attempted murder. (*People v. Arriola* (July 28, 2000, B131255) at pp. 2-4 [nonpub. opn.].) Pursuant to Senate Bill No. 1437, which enacted Penal Code section 1170.95, Arriola petitioned the trial court to vacate his sentences for attempted murder and resentence him on his remaining counts.[1] The trial court denied the petition on the ground that attempted murder is not a qualifying offense for relief under section 1170.95. We agree with the trial court and affirm.

DISCUSSION

In *People v. Chiu* (2014) 59 Cal.4th 155, 166 (*Chiu*) the Supreme Court held that a defendant could not be convicted of first degree murder on the basis of the natural and probable consequences doctrine, reasoning that the mental state required for first degree murder, including "elements of willfulness, premeditation, and deliberation" are "uniquely subjective and personal." A defendant could not be guilty of first degree murder unless he actually displayed that mental state. (*Ibid.*) The Court in *Chiu* held that defendants could still be guilty of second degree murder on a natural and probable consequences theory, however. (*Ibid.*)

In 2018, the Legislature enacted Senate Bill No. 1437, which moved beyond *Chiu* and eliminated the natural and probable consequences doctrine as a theory of guilt for second degree murder. (See Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 2 [amending section 188].) Under the new law, "in order to be

---

[1] Further statutory references are to the Penal Code.

convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3), as amended by Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 2.)[2] The bill also created a procedure by which a defendant convicted of murder under a natural and probable consequences theory may petition for relief in the trial court. (See Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 4 [enacting section 1170.95].) Arriola contends that Senate Bill No. 1437 also abolishes the natural and probable consequences doctrine in cases of attempted murder. We disagree.

Senate Bill No. 1437 unambiguously repeals the natural and probable consequences doctrine with respect to murder, but not attempted murder. As the court explained in *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1113 (*Lopez*) (review granted), the language of Senate Bill No. 1437 refers only to murder, not attempted murder. Furthermore, the text "expressly identifies its purpose as the need 'to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to

---

[2] The only exception is in cases of felony murder, in which a defendant who participated in one of certain enumerated felonies that resulted in the death of a victim may still be guilty of murder even if he did not act with malice aforethought. (See §§ 188, subd. (a)(3), 189, subds. (a) & (e).) Even in those cases, however, under Senate Bill No. 1437, a defendant is not guilty of murder merely by participating in a felony; instead, he must have either acted with reckless indifference to human life or personally solicited or participated in the killing. (See § 189, subd. (e), as amended by Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 3.)

kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' (Stats. 2018, ch. 1015, § 1, subd. (f).) Had the Legislature meant to bar convictions for attempted murder under the natural and probable consequences doctrine, it could . . . have done so." (*Lopez*, *supra*, at p. 1104.) Its failure to refer to attempted murder in the legislation reflects a decision not to alter the natural and probable consequences doctrine in cases of attempted murder. (*Ibid.*; accord, *People v. Munoz* (2019) 39 Cal.App.5th 738, 753-760, review granted Nov. 26, 2019, S258234.)

Arriola contends we should read the statute broadly to include attempted murder. He acknowledges that "[s]tatutes are generally construed according to their plain" meaning, but argues that the statute's plain meaning would yield the absurd consequence of attempted murderers being penalized more strictly than murderers. We are aware that our interpretation of Senate Bill No. 1437 leads to the strange consequence that a defendant who commits a crime in which a codefendant attacks a victim may now receive a lesser sentence if the victim dies than if he survives. Indeed, in a 1993 case, our Supreme Court warned against imposing greater punishment for attempted murder than for murder: A "[d]efendant should not be penalized because one of his victims survived; he should not be made to regret not applying the coup de grâce to that victim." (*People v. King* (1993) 5 Cal.4th 59, 69.)

But Senate Bill No. 1437 applies only to those who did not directly take part in a murder. If a defendant is in a position to decide whether or not to "apply[ ] the coup de grâce to [a] victim" (*People v. King*, *supra*, 5 Cal.4th at p. 69), he would be guilty as a perpetrator or direct aider and abettor, not under a natural and

probable consequences theory. More importantly, any reasonable interpretation of Senate Bill No. 1437 requires us to conclude that the Legislature intended to provide relief to certain defendants convicted of murder, but not those convicted of what we ordinarily consider lesser offenses. Under any interpretation of Senate Bill No. 1437, the natural and probable consequences doctrine remains in effect for many offenses that carry lengthy prison sentences.

Nor do we agree with Arriola's contention that the application of the natural and probable consequences doctrine to attempted murder violates his constitutional right to equal protection under the law. " 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "If the two groups are not similarly situated or are not being treated differently, then there can be no equal protection violation." (*Lopez*, *supra*, 38 Cal.App.5th at p. 1108.)

Arriola's contention fails because "those charged with, or found guilty of, murder are, by definition, not similarly situated with individuals who face other, less serious charges." (*Lopez*, *supra*, 38 Cal.App.5th at p. 1109.) And although they are closely related, "[m]urder and attempted murder are separate crimes." (*Ibid.*, citing *People v. Marinelli* (2014) 225 Cal.App.4th 1, 5 [" '[i]t is well established that " '[a]n attempt is an offense "separate" and "distinct" from the completed crime' " ' "].) The Legislature

unequivocally singled out murder as the target of reform in Senate Bill No. 1437. The text of the bill states that its purpose was "to more equitably sentence offenders in accordance with their involvement in homicides." (Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 1(b).) Murder requires a much greater sentence than attempted murder, with a term of 15 years to life for second degree murder (see § 190, subd. (a)), as opposed to a five-year minimum for attempted murder. (See § 664, subd. (a).) "The Legislature could have reasonably concluded reform in murder cases 'was more crucial or imperative' " (*Lopez*, *supra*, 38 Cal.App.5th at p. 1112) and limited the law to those cases in order to preserve the limited resources of the judicial system.

DISPOSITION

The trial court's order is affirmed.

NOT TO BE PUBLISHED

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.